REASONS THE WRIT SHOULD BE DENIED

QUESTION 1.

THE COURT OF APPEALS' DENIAL OF PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY DOES NOT INVOLVE AN IMPORTANT QUESTION OF LAW AND IS CONSISTENT WITH THIS COURT'S DECISION IN *MILLER-EL v. COCKRELL*, 537 U.S. 322 (2003)

Petitioner asks this Court to review the Ninth Circuit United States Court of Appeals' denial of a COA on his knowing-use-of-perjury claim. See *Napue v. Illinois*, 360 U.S. 264 (1959). In doing so, petitioner does not seek review of the denial, and apparently concedes that the Ninth Circuit properly denied him a COA, if his claim is viewed as nothing more than an allegation that the prosecutor knowingly used false testimony to help secure a conviction. (Cert. Pet. at 18.) Petitioner instead argues that his claim should have been viewed more broadly than that, and the Ninth Circuit should have recognized that his real claim for relief was one predicated on a split of authority among the federal circuits on whether a prosecutor's actual knowledge is an essential element of a *Napue* claim. See *Sanders v. Sullivan*, 863 F.2d 218, 224-25 (2d Cir. 1988); *Durlay v. Mayo*, 351 U.S. 277, 290-91 (1956) (Douglas, J., dissenting); cf. *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1119 (9th Cir. 2001). Had the Ninth Circuit considered this circuit split, petitioner suggests, then it would have found petitioner's claim "debatable" within the meaning of this Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and granted him a COA. (Cert. Pet. at 16-18.)

This Court should deny certiorari because (1) petitioner asks only that this Court review the Ninth Circuit's application of the COA standard to the particular facts of this case, (2) petitioner

is raising this alleged circuit split for the first time in his petition for writ of certiorari, (3) petitioner's new circuit authority would not have changed the resolution of the COA ruling in this case, and (4) the Ninth Circuit properly denied petitioner a COA consistent with this Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993).

A. Procedural Background Concerning Petitioner's Knowing-Use-Of-False Testimony Claim Involving Bruce Samuelson

On January 10, 1981, less than two days after the murder in this case, police arrested petitioner and placed him in custody in the San Joaquin County jail. By the following day, both petitioner's girlfriend and housemate had provided police with statements describing how petitioner confessed to them. In particular, these statements revealed that petitioner had murdered Terri Winchell by taking her to a remote area and attacking her with a belt, hammer, and knife. They also revealed how petitioner had planned the murder with his cousin, Rick Ortega, and that petitioner had raped Terri Winchell. (Cert. Pet., App. A at 7a-9a.)

Almost two years later in late 1982, after petitioner had already been held to answer for the murder and rape of Terri Winchell, a pro per defendant named Bruce Samuelson approached the Morales prosecutor in court in an unrelated case and advised him that he had information about the Morales case. The prosecutor received during this contact a handwritten note to that effect, and the prosecutor turned over the note to petitioner's defense counsel. In response to Samuelson's request, the prosecutor sent the investigating officer in petitioner's case to the local jail to interview Samuelson, and the officer obtained a statement from Samuelson and reported back to the prosecutor. Samuelson offered to testify in exchange for consideration. The statement corroborated the physical evidence in the case, as well as the statements already obtained from petitioner's girlfriend and housemate. (Cert. Pet.,

App. A at 9a.) The prosecutor then met with Samuelson, and advised him that in exchange for his statement, the best he could do was to recommend a local disposition.

On December 14, 1982, Samuelson appeared on his own case in municipal court in Stockton, California, and the proposed plea agreement was put on the record. Samuelson waived his preliminary hearing and agreed to enter a plea to one count of forgery and one count of auto theft in exchange for being placed on probation and sentenced to no more than one year in county jail. This offer, however, was not binding on the sentencing judge, and included the condition that Samuelson could withdraw his plea if the sentencing judge decided to sentence Samuelson to state prison or some other harsher treatment.

On February 7, 1983, the prosecutor requested that Samuelson take a polygraph examination. The examination took place the next day, and the examiner prepared a report stating his opinion that Samuelson was truthful in his statement that he had obtained information about the murder from petitioner and no other source. The report, the actual polygraph etchings, and the question sheet were then turned over to defense counsel.

On March 29, 1983, Bruce Samuelson testified against petitioner at the guilt phase of petitioner's trial. Pursuant to a defense request, no mention of the polygraph examination was made. However, Samuelson's proposed plea agreement was put on the record, and he was extensively cross-examined by petitioner's defense counsel concerning his motives for testifying and the circumstances of his own pending criminal cases. Thereafter, on May 26, 1983, Samuelson was sentenced on two counts to one year local time in custody.

More than ten years later, on January 14, 1994, petitioner filed his first amended petition for writ of habeas corpus in federal district court. Claim 5 of the petition alleged repeatedly, and only, that petitioner's constitutional rights were violated by the prosecution's knowing use of perjured testimony. The claim further alleged that "the facts testified to Samuelson were

provided by the District Attorney." Nowhere in the petition did this claim allege in the alternative that even if the prosecutor did not know that Samuelson's testimony was false, the prosecutor should have known that it was false.

In the district court, petitioner alleged that the prosecution had planted Samuelson in a jail cell near petitioner in order to make it appear that Samuelson could have obtained a statement from petitioner, and concealed from the defense secret meetings with Samuelson. According to petitioner, the polygraph examination was nothing more than a prosecution "ruse" designed to conceal the fabrication of evidence and to mislead defense counsel into believing that petitioner had actually confessed to Samuelson.

On September 28, 1998, the district court denied petitioner's request for an evidentiary hearing and also denied this *Napue* claim on its merits. In so doing, the district court rejected the claim on the basis that there was no evidence that the prosecution had knowingly presented false testimony. Petitioner's showing, the court ruled, demonstrated nothing more than speculation that the prosecutor had engaged in nefarious conduct, given the prosecutor's request for a polygraph examination.

Petitioner did not object to the district court's characterization of the claim as only involving a "knowing-use" *Napue* claim. Nor did petitioner seek any clarification or reconsideration of his claim on the basis that a prosecutor's actual knowledge was not an element of the claim. Approximately eight months after the district court denied this claim, the district court entered a judgment denying the petition for writ of habeas corpus.

After the district court issued a certificate of probable cause to appeal, petitioner filed his opening brief on appeal and briefed the claim fully on the merits. This Court then issued its decision in *Slack v. McDaniel*, 529 U.S. 473, 481-82 (2000), which held that the Anti-terrorism And Effective Death Penalty Act's (AEDPA) requirement for issuance of a COA applied to all federal habeas corpus cases where the notice of appeal was

filed after the effective date of the AEDPA.

On appeal, the Ninth Circuit affirmed the district court's judgment denying petitioner relief, but in doing so, it first reviewed all of the claims raised in petitioner's opening brief to determine as to each claim whether to issue a certificate of appealability. In so doing, the court articulated the appropriate standard for issuance of a COA, citing its own en banc decision in *Mayfield v. Woodford*, 270 F.3d 915, 921 & n. 5, (9th Cir. 2000), and this Court's decisions in *Slack v. McDaniel*, 529 U.S. 473, 481-82, and *Miller-El v. Cockrell*, 537 U.S. 322 (2003). In particular, the court stated that petitioner had to demonstrate as to each issue "'a substantial showing of the denial of a constitutional right.'" This standard could be met, the court stated, if petitioner demonstrated "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further'" The court then granted a COA on five issues, and denied a COA on the remaining issues, including petitioner's *Napue* claim involving Samuelson, without further discussion. (Cert. Pet., App. A at 12a-14a.)

B. Certiorari Should Be Denied Because Petitioner Does Not Claim The Court Of Appeals Applied The Incorrect Standard For Granting A COA, But Merely Seeks Review Of The Application Of The Standard To The Unique Facts Of This Case

In *Miller-El*, this Court recognized that before an appeal may be entertained, a prisoner who has been denied relief in the district court must obtain a COA. 28 U.S.C. § 2253; *Miller-El*, 537 U.S. at 335-36. And, while section 2253 permits the issuance of a COA only when a petitioner has made a "substantial showing of the denial of a constitutional right," "[a] 'substantial showing' *does not entitle* an applicant to a COA; it is a necessary and not a sufficient condition." *Miller-El*, 537 U.S. at 349 (conc. opn. of Scalia, J.) (emphasis in original).

This Court confirmed that a COA determination is a "threshold inquiry" that does not require a showing that the appeal will succeed, it nonetheless does not mean that a COA must always issue, and the "issuance of a COA must not be pro forma or a matter of course." *Id.* at 337. This Court then formulated the test for a COA established in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), the same test applied by the court of appeals in the instant case: "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El*, 537 U.S. at 338.

While petitioner asserts that the Ninth Circuit opinion in this case "cannot be reconciled with *Miller-El*," and "review is necessary to vindicate its reach," (Cert. Pet. at 15, 18), petitioner does not actually dispute that the court of appeals applied the correct standard for granting a COA. In fact, petitioner actually agrees that there is no merit to his COA request if the Ninth Circuit was correct in construing his claim only as an allegation of the knowing use of perjured testimony. He concedes that under the "actual knowledge standard, the panel could only have believed that the Samuelson claim was meritless." (Cert. Pet. at 18.) Petitioner's complaint therefore has nothing to do with the actual contours of the rule articulated by the Ninth Circuit.

Indeed, the court of appeals acknowledged here that the "substantial showing" requirement for a COA is satisfied when a petitioner can demonstrate that the issues are debatable among jurists of reason, that a court could resolve the issues differently, or that the questions are adequate to deserve encouragement to proceed further. (Cert. Pet., App. A at 12a.) There is nothing in the court of appeals' opinion that suggests the need for this Court to revisit the question of what constitute the threshold elements for issuance of a COA.

Any review of the COA determination in this case is unlikely to have any precedential value to any federal court faced with a request for a COA. First, this case is a pre-AEDPA case, which means that it will have virtually no application to the

overwhelming majority of federal habeas corpus cases pending throughout the nation. Second, this is a "window" case where the law changed under *Slack* between filing of the notice of appeal and the resolution of the appeal. It is highly unlikely that there are many pre-AEDPA federal habeas appeals still pending in need of guidance on this issue.. Third, because this is a pre-AEDPA case, resolution of the COA question in petitioner's favor would create an unresolvable conflict with this Court's own precedent.

The conflict would result because when reviewing COA requests, federal courts must "look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336. Accordingly,

> suppose a state prisoner presents a constitutional claim that reasonable jurists might find debatable, but is unable to find any "clearly established" Supreme Court precedent in support of that claim (which was previously rejected on the merits in state-court proceedings). Under the Court's view, a COA must be denied, even if the habeas petitioner satisfies the "substantial showing of the denial of a constitutional right" requirement of § 2253(c)(2), because all reasonable jurists would agree that habeas relief is impossible to obtain under § 2254(d).

Id. at 350 (Scalia, J., concurring).

If this Court were to grant certiorari and rule that circuit conflicts merited COAs, then the ruling would conflict with Justice Scalia's concurrence in *Slack* because petitioner concedes that the rule he identifies as the basis for the circuit conflict is not clearly established under the AEDPA. (Cert. Pet. at 17 n.12.) *Drake v. Portuondo*, 321 F.3d 338, 345 n.2 (2nd Cir. 2003). However, because this case is not an AEDPA case, this Court could not resolve here the issue raised by Justice Scalia's opinion in *Slack*. Since a primary purpose of certiorari review is to resolve conflict and uncertainty in the law, not to

create it, this case is an inaapropriate vehicle for this Court's exercise of certiorari power.

Petitioner's argument thus amounts to a mere quarrel with the straight-forward application of established law to the "particular facts" of this case. As such, Question 1 does not justify issuance of the writ of certiorari. See *United States v. Johnston*, 268 U.S. 220, 227 (1925).

C. Certiorari Should Be Denied Because Petitioner Raises An Alleged Conflict Of Circuit Authority For The First Time In His Petition For Writ Of Certiorari

Petitioner's principal argument for certiorari is that two circuit courts of appeal, the Ninth and Second, have ruled that actual knowledge is not an element of a *Napue* claim, thereby creating a conflict among the circuits, and that review is necessary to consider whether a circuit court can ignore such conflicts when it considers an application for a COA. In truth, a more accurate statement of the issue presented for review is whether a circuit court can ignore alleged conflicts among the circuits when those conflicts have never been brought to any court's attention. It is undisputed that until this certiorari petition was filed in this case, petitioner has *never* identified the alleged conflicts under *Bowie*, *Sanders*, and *Durlay* at *any* point during the 14 years that this habeas case has progressed through federal court. It is well-settled that arguments neither raised, nor addressed, in the courts below have no place in a petition for writ of certiorari, and therefore preclude review by this Court. *Pasquantino v. United States*, __ U.S. __, 125 S. Ct. 1766, 1781 n. 14 (2005); *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001).

There are two reasons that make petitioner's failure to raise this argument at an earlier juncture particularly disturbing. On appeal before the Ninth Circuit, the court denied a certificate of appealability as to 22 "undeveloped arguments suggested in footnotes." (Cert. Pet., App. A at 13a-14a.) Petitioner does not

contest the denial of a COA on any of these 22 undeveloped arguments. Instead, he seeks to reopen his appeal based on a brand new undeveloped argument. It would be a travesty of justice if certiorari were granted here because it would reward petitioner for withholding arguments for relief that he should have presented in both the district court and the Ninth Circuit.

Petitioner's omission is particularly glaring here because in the Ninth Circuit, respondent had relied on circuit precedent that explicitly held that actual knowledge is an essential element of a *Napue* claim. *Marcella v. United States*, 344 F.2d 876, 880 (9th Cir. 1965); accord, *Long v. United States*, 422 F.2d 1024, 1026 (9th Cir. 1970); *United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1992). Respondent further asserted that without such knowledge, petitioner's claim was really nothing more that a non-cognizable freestanding claim that he had been wrongly convicted under *Herrera v. Collins*, 506 U.S. 390. Finally, respondent observed that petitioner's general exposition of the law in his opening brief on appeal had "erroneously conflate[d] the [*Brady* and *Napue*] materiality tests into a single standard."

In neither his reply brief, nor at any point thereafter did petitioner respond to these assertions. Never once did petitioner ask the Ninth Circuit to distinguish, extend, or overrule its decisions in *Marcella*, *Long*, and *Sherlock*. Never once did petitioner cite the Second Circuit's decision in *Sanders*, or the Ninth Circuit's own decision in *Bowie*, or Justice Douglas' dissenting opinion in *Darlay*. Never once did petitioner respond to respondent's criticism that his exposition of the law had erroneously conflated *Napue* and *Brady*. Never once did petitioner either embrace or disavow respondent's assertion that the true nature of a *Napue* claim that eliminated the actual knowledge requirement was a free-standing innocence claim. Petitioner should not be rewarded for such sandbagging. For all of these reasons, certiorari should be denied for petitioner's failure to raise this claim at any earlier point during the 14 years this case has been pending in federal court. *Pasquantino v. United States*, 125 S. Ct. at 1781 n. 14; *TRW, Inc. v. Andrews*,

534 U.S. at 34; *Lopez v. Davis*, 531 U.S. at 244 n.6.

D. Certiorari Should Be Denied Because Petitioner's New Theories Of Relief Would Not Have Earned Him A COA

While petitioner asserts that the there exists a conflict among the circuits concerning whether the knowing use of perjured testimony is a requisite element of a *Napue* claim, petitioner does not attempt to explain how that conflict, if recognized by the Ninth Circuit, would have earned him a COA. As noted above, *Miller-El* requires that petitioner demonstrate how reasonable jurists could have decided the *Napue* claim differently in the district court. No reasonable jurist could have decided petitioner's claim differently in the district court because petitioner never put the district court on notice that he was proceeding on the basis of the Second Circuit's rule in *Sanders*. Indeed, the allegation that the prosecutor did not, but should have known, that Samuelson's testimony was false, appears *nowhere* in the first amended petition for writ of habeas corpus. As for the Ninth Circuit's decision in *Bowie*, it had not yet issued at the time of the district court's decision, and therefore could not have been part of the COA calculus.

The Second Circuit's rule of law, if considered, also fails to suggest that the district court's assessment was debatable or wrong. As stated in *Sanders*, "a state's failure to act to cure a conviction founded on a credible recantation by an important and principal witness, exhibits sufficient state action to constitute a due process violation." *Sanders*, 863 F.2d at 224. Here, petitioner never asserted that Samuelson had credibly recanted his trial testimony. Indeed, the applicability of the *Sanders* rule has been distinguished on the basis that the rule requires the petitioner first to come forth with a recantation. *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997). No reasonable jurist could find the failure to apply the *Sanders* rule debatable or wrong in a case where no recantation existed.

The Ninth Circuit's rule, if considered, likewise would not

have assisted petitioner. As stated in *Bowie*, the rule focuses on "bad faith as a matter of law on the part of the [prosecutor's] Office in refusing to investigate the potentially exonerating evidence that its own witnesses were conspiring to commit perjury." *Bowie*, 243 F.3d at 1119. *Bowie* involved uncontroverted evidence that the prosecution *actually knew* before trial that its witnesses were planning to commit perjury in order to secure a conviction of the defendant. This, the court held, revealed the prosecution's actual intent to secure a conviction at the cost of condoning perjury. *Id.* at 1120.

At no time in this case has petitioner alleged that the prosecutor before trial came across any plan to commit perjury by Samuelson or any other witness in this case. To the contrary, a polygraph examiner gave the prosecutor an opinion that Samuelson was truthful in his statement that he had obtained information about the murder from petitioner and no other source. So even if the Ninth Circuit were required to consider sua sponte whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" under *Bowie*, petitioner still would not have been entitled to a COA under *Miller-El*. See 537 U.S. at 338.

Finally, even if the Ninth Circuit were to apply either the rule in *Sanders* or *Bowie*, petitioner still would have been denied a COA because no reasonable jurist could have found Samuelson's testimony material under *Napue*[1]. As detailed in the Ninth Circuit's opinion in this case. (Cert. Pet., App. A at 7a-9a), petitioner made virtually the same admissions to Samuelson as he did to his girlfriend and roommate on the day of the murder. Through the two females' combined testimony,

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1. The materiality standard in *Sanders*, provides a higher threshold for relief than the *Napue* reasonable possibility standard. *Sanders*, 863 F.2d at 225 ("Only recantations of material testimony that would most likely affect the verdict rise to the level of a due process violation[.]")For argument's sake, respondent is applying the lower *Napue* standard.

and their testimony alone[2], the prosecution was able to establish that Morales had described how he had positioned himself in his cousin's car sitting behind the Terri Winchell as his cousin drove, and that petitioner began his attack by attempting to strangle her with his belt until it broke. He then continued the attack by hitting her over the head repeatedly with a hammer, and then dragged her out into a vineyard where he stabbed and raped her. This testimony, combined with their detailed testimony describing how petitioner had "practiced" the killing the day before the murder, and petitioner's actions immediately before and after the murder, and the physical evidence in the case provided overwhelming evidence of petitioner's guilt

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2. Petitioner has does *not* ask this Court to review any *Napue* claim concerning either of these two witnesses, although he has challenged their testimony on such grounds below. Petitioner observes that his girlfriend signed a declaration on his behalf partially recanting her trial testimony, (Cert. Pet. at 7), blaming her testimony on police accusations that she was initially "withholding information" and also on her shocking confrontation with photographs and details of the murder scene. Even accepting the partial recantation, petitioner's girlfriend maintains to this day that on the night of the murder, petitioner and his cousin left her presence for an hour, and then returned with petitioner walking into the house with blood on his hands. Petitioner threw his belt at his girlfriend and told her that "the belt broke." The belt had Terri Winchell's blood on it and was in two pieces. It was later recovered from the house hidden under a mattress, along with the hammer, which was hidden in the refrigerator and still had traces of blood inside the wooden neck. Petitioner then dumped the contents of Terri Winchell's purse on the table and showed his girlfriend Winchell's high school identification card. Petitioner's housemate provided the much same testimony as Samuelson concerning petitioner's admissions on the details of the crime and has never recanted her testimony.

independent of Samuelson's testimony.

Petitioner claims that Samuelson's testimony was the key in establishing the lying-in-wait special circumstance. (Cert. Pet. at 18.) But the above-described evidence amply supports the fact that petitioner had intentionally killed after a substantial period of watchful waiting followed by an immediate attack that caught the victim unaware. Indeed, petitioner's girlfriend testified that petitioner stated that the victim "was a tough girl," that "it took awhile," and that Terri Winchell "was screaming for Rick . . . to make him stop." (Cert. Pet., App. A at 9a.) These cries for help, the California Supreme Court found, "indicated that she was taken by surprise, and was previously unaware of any plan to harm her." (Cert. Pet., App. A at 121a.) It is therefore beyond debate that petitioner's new theories of relief would have made no difference in the resolution of the COA issue in this case.

E. Certiorari Should Be Denied Because The Ninth Circuit Properly Denied Petitioner A COA Consistent With This Court's Decision In *Herrera v. Collins*, 506 U.S. 390

Petitioner's alternative theory of relief, is at its core, really just a claim that he is actually innocent, and therefore the Ninth Circuit's denial of a COA is entirely consistent with this Court's decision in *Herrera v. Collins*, 506 U.S. 390. As *Herrera* confirms, this Court has never endorsed the view that free-standing claims of innocence are cognizable on federal habeas. And but for the fact that *Herrera* involved the "disturbing" allegation that an innocent person was about to be executed, a majority of this Court agreed that legally guilty persons are not constitutionally entitled on federal habeas to yet another judicial proceeding to adjudge their guilt anew. 506 U.S. at 400-01, & 420 (O' Connor, J. concurring).

However, this Court in *Herrera* has assumed that if such a right were to exist, then relief could only be predicated upon "a truly persuasive demonstration of 'actual innocence.'" This

standard is "extraordinarily high" and requires that newly discovered evidence be considered in light of the evidence at trial. *Id.* at 418. The showing must "unquestionably establish [] innocence." *Schlup v. Delo*, 513 U.S. 298, 317 (1995).

Here, there could be no conceivable debate about whether petitioner could meet this standard in light of the overwhelming evidence of his guilt at trial, and because petitioner conceded his guilt to the jury at trial when he admitted to his defense mental health expert that he had, in fact, murdered and raped Terri Winchell exactly as the prosecution had alleged. In addition to all the physical evidence and testimony put on by the prosecution to prove petitioner's guilt, petitioner conceded at trial through his mental health expert's testimony that he had, in fact, sat behind Terri Winchell after she had been lured into Ortega's car, and that he did slip his belt around her neck, only to have it break, followed by petitioner repeatedly hitting Winchell in the head with the hammer until he knocked her unconscious. Petitioner further confirmed that he took Winchell out of the car and dragged her into a vineyard where he first raped her and then left, but went back to stab her to be sure she was dead. Petitioner's mental health expert testified that petitioner was consciously aware of what he was doing during the murder, and that petitioner had admitted to her that what he had done was "wicked." In light of these conceded facts, certiorari should be denied as to Question 1. There is simply no conceivable doubt here that petitioner is actually guilty of lying-in-wait murder.

QUESTION 2.

THE COURT OF APPEALS' FINDING THAT CALIFORNIA'S LYING-IN-WAIT SPECIAL CIRCUMSTANCE GENUINELY NARROWS THE CLASS OF DEATH-ELIGIBLE DEFENDANTS UNDER THE EIGHTH AMENDMENT DOES NOT INVOLVE AN

IMPORTANT QUESTION OF LAW AND IS CONSISTENT WITH THIS COURT'S DECISIONS IN *ARAVE v. CREECH*, 507 U.S. 463 (1993)

Petitioner next asks this Court to review the Ninth Circuit's holding in this case that California's lying-in-wait special circumstance classification genuinely narrows the class of death-eligible murders under the Eighth Amendment. In particular, petitioner asserts that because California's lying-in-wait special circumstance does not require physical concealment as an element of the murder, the classification applies to most, if not all, premeditated or first degree murders in California. (Cert. Pet. at 22.) Petitioner proposes that genuine narrowing within in the meaning of the Eighth Amendment must create a substantially smaller sub-class of first degree murder defendants for whom death is a possible sentence.

This Court should deny certiorari because (1) petitioner asks only that this Court review the Ninth Circuit's application of settled Eighth Amendment narrowing precepts to the particular facts of this case, and (2) the Ninth Circuit properly denied petitioner a COA consistent with this Court's decision in *Arave v. Creech*, 507 U.S. 463 (1993).

A. Procedural Background Regarding California's Lying-In-Wait Special Circumstance Statutory Classification

In California, the class of murders eligible for the death penalty is limited to first degree murders, and that class is further narrowed to only those first degree murders that are accompanied by at least one special circumstance finding proven beyond a reasonable doubt. See Cal. Penal Code §§ 187, 189, 190.2. Before California's lying-in-wait murder special circumstance can be found true, there must be a first degree murder and findings that "[t]he defendant intentionally killed the victim while lying in wait." Cal. Penal Code § 190.2(a)(15). In addition to the intentional killing requirement, the three

elements of killing "while lying in wait" entail (1) concealment of purpose, 2) a substantial period of watching and waiting for an opportune time to act, and 3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. *People v. Morales*, 48 Cal. 3d at 557.

On appeal before the California Supreme Court, petitioner's presented an Eighth Amendment narrowing challenge to this special circumstance, arguing that the absence of a physical concealment element provided "no meaningful basis for distinguishing capital and noncapital [murder] cases." *Morales*, 48 Cal.3d at 557. The court rejected the argument that the absence of a physical concealment requirement allowed the special circumstance to be found in "routine" intentional murders where the defendant "waits and watches – without notifying his victim of his intent to attack – before inflicting the fatal injuries." *Id.*

In particular, the court stated:

> [W]e believe that an intentional murder, committed under circumstances which include (1) concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, presents a factual matrix sufficiently distinct from "ordinary" premeditated murder to justify treating it as a special circumstance.

Morales, 48 Cal.3d at 557.

The court further summarized its holding as finding that "an intentional murder undertaken by lying in wait in the foregoing manner is properly among the kinds of aggravated killing which justify society's most severe penalty." *Morales*, 48 Cal.3d at 558.

The district court and the Ninth Circuit rejected the same Eighth Amendment narrowing challenge. In the district court, relying on this Court's decision in *Arave v. Creech*, 507 U.S. 463 (1993), the court found that it was sufficient that the

classification did not apply to all first degree murders. (Cert. Pet., App. B at 71a-73a.) On appeal, the Ninth Circuit agreed with this assessment, this time citing this Court's opinion in *Tuilaepa v. California*, 512 U.S. 967, 972 (1994), for the proposition that Eighth Amendment narrowing required only the creation of "'a sub-class of defendants convicted of murder.'" (Cert. Pet., App. A at 27a.)

While there was a dissenting opinion in the Ninth Circuit, both the majority and the dissent agreed that California's lying-in-wait special circumstance category does, in fact, create within the death-eligible class of all California first degree murders a smaller category of murders for which death is a possible sentence. As the majority stated: "The combination of [California's lying-in-wait special circumstance] elements embraces some first-degree murders, but not all." (Cert. Pet., App. A at 31a.) "Some murders are accomplished by ambush, some are not, and the special circumstance sorts out which is which." (Cert. Pet., App. A at 33a.) And as the dissent agreed: "The majority provides examples of cases in which the lying-in-wait special circumstance would not apply [.] I do not dispute that[.] But that is beside the point." (Cert. Pet., App. A at 59a.) Petitioner does not dispute these points of agreement.

The two opinions diverged on the legal significance of this fact. For the majority, it was sufficient that "common murder scenarios" prevent the lying-in-wait special circumstance from applying "'to every defendant convicted of murder.'" (Cert. Pet., App. A at 31a-32a.) Under the dissent's criteria, "it is not enough that a death penalty statute applies to some but not all murder defendants. Rather, the inquiry is whether the statute is narrow enough – whether the subclass of defendants is sufficiently smaller than the overall class of murder defendants." (Cert. Pet., App. A at 59a.) In the dissent's view, the narrowing criteria must "result in a significantly small subclass of murder defendants who qualify for death penalty consideration." (Cert. Pet., App. A at 50a.)

B. Certiorari Should Be Denied Because Petitioner Merely Seeks Review Of The Application Of Settled Law To The Facts Of This Case

In *Arave v. Creech*, 507 U.S. 463 (1993), this Court decided whether the state of Idaho had given its "utter-disregard-for-human-life" aggravating circumstance a limiting construction sufficient to survive an Eighth Amendment vagueness challenge. The Court held that the circumstance was determinate because Idaho courts had construed the circumstance to refer to a "cold-blooded, pitiless slayer." These terms, the Court found, described clear and objective ascertainable facts concerning the defendant's attitude toward his conduct and his victim. *Arave v. Creech*, 507 U.S. at 470-74.

The Court then decided whether that same construction, a "cold-blooded, pitiless slayer," was itself enough to "'genuinely narrow the class of persons eligible for the death penalty.'" *Arave v. Creech*, 507 U.S. at 474 citing *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The Court stated the proposition that "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Id.* citing *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) (describing an invalid aggravating circumstance that "an ordinary person could honestly believe" described every murder), and *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (recognizing that "a person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'")

The Court rejected the narrowing challenge by comparing the class of murderers eligible for capital punishment under Idaho law, that of all first degree murders, to the class of "cold-blooded, pitiless" murders identified in the "utter-disregard" aggravating circumstance. *Arave v. Creech*, 507 U.S. at 475. In particular, the Court began by conceding that within the broad categories of death-eligible first degree murder, "the word

'pitiless,' standing alone, might not narrow the class defendants eligible for the death penalty. A sentencing judge might conclude that every first-degree murder is 'pitiless' because it is difficult to imagine how a person with any mercy or compassion could kill another human being without justification." *Id.* at 475.

However, the determinative inquiry instead focused on whether, under the Idaho statutory scheme, "a sentencing judge reasonably could find that not all Idaho capital defendants are 'cold-blooded.' That is because *some* within the broad class do exhibit feeling[s]" such as "anger, jealousy, revenge or a variety of other emotions." *Arave v. Creech*, 507 U.S. at 475-76 (emphasis added). In so doing, the Court held that the "cold-blooded, pitiless" construction had "narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." *Id.* at 476.

In seeking review here, petitioner does not even mention the narrowing analysis described above in *Arave*. In the same vein, the dissenting opinion in this case does not mention this analysis either. While it may be inferred that petitioner disagrees with this analysis since it is the same analysis used by the majority opinion in this case, petitioner makes no attempt whatsoever to persuade this Court to modify, extend, clarify, or overrule any aspect of it's decision in *Arave*. Given the absence of any explanation why the rule in *Arave* needs to be revisited, it can only be inferred that petitioner is attempting to use certiorari review simply to quarrel with the straight-forward application of established law to the "particular facts" of this case. As such, Question 2 does not justify issuance of the writ of certiorari. See *United States v. Johnston*, 268 U.S. at 227.

C. Certiorari Should Be Denied Because The Ninth Circuit Properly Denied Petitioner A COA Consistent With This Court's Decision In *Arave v. Creech*, 507 U.S. 463 (1993)

A close examination of the Ninth Circuit's majority opinion here reveals that the court properly rejected petitioner's narrowing challenge under *Arave*. Just as the majority opinion here found it sufficient that "[t]he combination of [California's lying-in-wait special circumstance] elements embraces some first-degree murders, but not all[,]" (Cert. Pet., App. A at 31a.) (emphasis added), this Court in *Arave* found it sufficient "that *not all* Idaho capital defendants are 'cold-blooded[]' [] because some within the broad class do exhibit feeling[s]" such as "anger, jealousy, revenge or a variety of other emotions." *Arave*, 507 U.S. at 475-76 (emphasis added). Thus, while the dissenting opinion finds that "it is not enough that a death penalty statute applies to some but not all murder defendants[,]" (Cert. Pet., App. A at 59a), this Court held in *Arave* that it *was* enough that a death penalty statute applies to some but not all murder defendants.

The dissenting opinion in this case chided the majority opinion for coming up with examples of murder cases where the lying-in-wait special circumstance would not apply: "I do not dispute that, with imagination and creativity, one can explain away the constitutional infirmities of the California death penalty." (Cert. Pet., App. A at 59a.) However, this is exactly the same analysis used in *Arave* to "explain away the constitutional infirmities" in Idaho's death penalty statutory scheme: "Some [of Idaho's capital defendants under the statutory scheme], for example, kill with anger, jealousy, revenge, or a variety of other emotions." *Arave*, 507 U.S. at 476. Certiorari should be denied as to Question 2 because the Ninth Circuit's ruling correctly denied petitioner relief under this Court's decision in *Arave*.

QUESTION 3.

THE COURT OF APPEALS' SELECTION OF THE HARMLESS ERROR STANDARD UNDER *BRECHT V. ABRAHAMSON*, 507 U.S. 619 (1993) DOES NOT INVOLVE AN IMPORTANT QUESTION OF LAW

Petitioner next asks this Court to review the Ninth Circuit's choice of the harmless error standard set forth for federal review of state convictions under *Brecht v. Abrhamson*, 507 U.S. 507 U.S. 619 (1993), as opposed to the harmless error standard set forth generally for constitutional violations under *Chapman v. California*, 386 U.S. 18 (1967). The Ninth Circuit's use of the *Brecht* standard instead of the *Chapman* standard merits review because, petitioner argues, there is a conflict among the circuits whether *Brecht* applies when a federal court disagrees, as in this case, with the state court's harmless error analysis under *Chapman*. See *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993). Petitioner does not ask this Court to review the Ninth Circuit's application of the *Brecht* rule itself to the facts of this case.

This Court should deny certiorari because (1) the choice of harmless error standards on federal habeas review involves the insubstantial idiosyncratic view of a single circuit that has been rendered academic by the passage of the AEDPA, and (2) petitioner is raising this alleged circuit split for the first time in his petition for writ of certiorari.

A. Certiorari Should Be Denied Because Petitioner Relies Upon A Rule That Has Been Unanimously Rejected By Eight Other Circuits And Has Virtually No Chance Of Affecting The Outcome Of Any Other Cases

It is significant to point out that the Eighth Circuit's rule, announced in *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir.

1993), and applied in two other cases, *Pruett v. Norris*, 153 F.3d 579, 590 (8th Cir. 1998) and *Starr v. Lockhart*, 23 F.3d 1280, 1291-92 (8th Cir. 1994), has been rejected by all eight of the circuit courts to consider its adoption. See *Hassine v. Zimmerman*, 160 F.3d 941, 951 (3d Cir. 1998); *Sherman v. Smith*, 89 F.3d 1134, 1141 (4th Cir. 1996); *Hogue v. Johnson*, 131 F.3d 466, 499 (5th Cir. 1997); *Gilliam v. Mitchell*, 179 F.3d 990, 995 (6th Cir. 1999); *Tyson v. Trigg*, 50 F.3d 436, 446-47 (7th Cir. 1995); *Bains v. Cambra*, 204 F.3d 964, 967 (9th Cir. 2000); *Castro v. Oklahoma*, 71 F.3d 1502, 1515-16 & n. 14 (10th Cir. 1995); *Horsley v. Alabama*, 45 F.3d 1486, 1492 n. 11 (11th Cir. 1995). This unanimous and overwhelming rejection of the rule among the circuits demonstrates that the conflict fails to raise a truly significant or important question of law.

In addition, because of the passage of the AEDPA, the conflict here has been rendered merely academic with little or no chance of affecting federal habeas corpus cases elsewhere in the United States. Under the AEDPA, no federal court would ever inquire whether a state court's application of the *Chapman* harmless error standard is erroneous. See *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). Instead, federal courts reviewing a state court's harmless error analysis must ascertain whether the state court adjudication under 28 U. S. C. § 2254(d) is either contrary to, or an unreasonable application of clearly established Supreme Court precedent. See *Mitchell v. Esparza* 540 U.S. 12, 17 (2003) (per curiam).

In a universe of cases where a federal court has found a state court's application of the *Chapman* rule unreasonable under 28 U. S. C. § 2254(d), it is difficult to imagine a subset of cases where the constitutional violation is harmless under *Brecht*. In other words, the deference standard under section 2254(d) requires a review of state court *Chapman* analysis that is, at the very least, as favorable to the States as the *Brecht* standard of review. So, as a practical matter, if this Court were to grant review in this pre-AEDPA case, and to agree that *Chapman* is the proper harmless error standard, then the court's ruling would

likely affect very few cases. Certiorari therefore should be denied because petitioner fails to present a substantial question of law.

B. Certiorari Should Be Denied Because Petitioner Raises An Alleged Conflict Of Circuit Authority For The First Time In His Petition For Writ Of Certiorari

Petitioner's quarrel with the selection of the *Brecht* harmless error standard on federal habeas review was never raised in either the court of appeals, or the district court. It is well-settled that arguments neither raised, nor addressed, in the courts below have no place in a petition for writ of certiorari, and therefore certiorari should be denied. *Pasquantino v. United States*, 125 S. Ct. at 1781 n. 14; *TRW, Inc. v. Andrews*, 534 U.S. at 34; *Lopez v. Davis*, 531 U.S. at 244 n.6. In light of this, certiorari should be denied as to Question 3.

QUESTION 4.

THE ISSUE WHETHER THE COURT OF APPEALS SHOULD HAVE REMANDED THE CASE BACK TO THE CALIFORNIA SUPREME COURT FOR FURTHER STATE COURT REVIEW IS NOT PRESENT IN THIS CASE

Finally, petitioner asks this Court to grant review so as to ascertain whether the Ninth Circuit should have remanded this case back to the California Supreme Court for further review after the Ninth Circuit had assumed that California was, in fact, a weighing state within the meaning of this Courts Eighth Amendment jurisprudence. Petitioner relies on the fact that this Court has already granted review and currently is considering this remand option in *Brown v. Sanders*, case number 04-980. (Cert. Pet. at 26-29.) Certiorari should be denied because the

Ninth Circuit found any error harmless and petitioner does not ask this Court to review the Ninth Circuit's harmless error analysis.

Here, the Ninth Circuit found that the torture murder special circumstance finding in this case was invalid, but harmless under the *Brecht* harmless error standard. In so doing, the Ninth Circuit did not resolve a dispute as to whether California's current capital sentencing scheme constitutes a "weighing state" as the term has been used by this Court in capital cases. Instead, the court assumed for the sake of argument that California is a weighing state, and denied petitioner relief by applying *Brecht*. (Cert. Pet., App.A at 14a-25a.) In *Sanders*, this Court is considering whether California is a weighing state, and assuming it so finds, whether remand to state court for reweighing, is an option.

No matter what the outcome in *Sanders* will be, the case would have no effect on the resolution of this case. Assuming this Court reaches the question, and finds that remand is an option, this holding would not affect this case because the Ninth Circuit denied petitioner relief. Remand would be an idle act. If this Court were to find that California is not a weighing state, or alternatively, that the Ninth Circuit's harmless error analysis was too stringent, then the result in this case would still remain the same. And the same holds true if this Court were to hold in *Sanders* that California is a weighing state, and were to agree with the harmless error analysis applied in that case. This is especially true here since petitioner does not seek review of the Ninth's Circuit application of the *Brecht* harmless error analysis to the facts of this case. Certiorari should therefore be denied as to Question 4.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: August 29, 2005

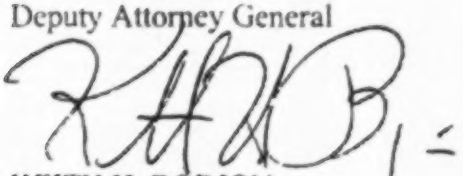
Respectfully submitted.

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

KRISTOFER JORSTAD
Deputy Attorney General



KEITH H. BORJON
Supervising Deputy Attorney General
Counsel of Record

Counsel for Respondent and Appellee

LA2005501989

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IN THE

Supreme Court of the United States

MICHAEL ANGELO MORALES,

Petitioner,

v.

JILL L. BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

DAVID A. SENIOR
Counsel of Record
McBREEN & SENIOR
1880 Century Park East
Los Angeles, CA 90067
(310) 552-5300

JEFFREY P. KEHNE
AKIN GUMP STRAUSS HAUER
& FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4515

WILLIAM A. NORRIS
L. RACHEL HELYAR
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

September 13, 2005

Attorneys for Petitioner

196675

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CAPITAL CASE

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With the invalidation of the torture special circumstance in this case, which the California Attorney General (the "AG") does not challenge here, petitioner Michael Morales faces execution based on a single special circumstance - a jury finding that he committed murder after lying in wait. That finding is invalid because it rests on false testimony presented by the prosecution in violation of Morales's due process rights, and because California's lying-in-wait special circumstance is facially invalid under the Eighth Amendment. Morales seeks review from this Court to correct the Ninth Circuit's unexplained refusal even to issue a COA permitting review of the due process challenge, and its rejection of the Eighth Amendment challenge.

Morales also seeks review of errors that the Ninth Circuit committed in reviewing the second of two special circumstances considered by the jury. The Ninth Circuit's decision to evaluate this sentencing error under *Brecht*, rather than under more searching standards articulated in *Chapman* or *Clemons* implicates a longstanding circuit split. Further, the Ninth Circuit's decision to perform this reweighing itself, instead of permitting initial reanalysis by the California courts, is at odds with limits on federal habeas courts that the AG has asked this Court to adopt in *Brown v. Sanders*, a California death penalty case pending before this Court.

The brief in opposition fails to develop a persuasive argument against review on any of these issues. Instead, the AG stands on meritless procedural diversions and baseless attempts to minimize the significance of the issues.

I. Review Is Warranted To Correct The Ninth Circuit's Failure, In The Face Of A Division Of Relevant Appellate Authority, To Issue A COA Allowing Merits Consideration Of Morales's *Napue* Claim.

The prosecution's use of Samuelson's fabrications to obtain a death sentence against Morales raises serious due process concerns under *Napue v. Illinois*, 360 U.S. 264 (1959). The Ninth Circuit, however, refused to address this due process claim, denying without explanation the COA required for appellate consideration on the merits. The brief in opposition does not offer a serious justification for this

disposition of Morales's *Napue* challenge. Instead, the AG exploits the Ninth Circuit's silence by throwing up a series of unfounded procedural objections and assertions concerning the state of the record and the law. In the end, this diversionary tactic only underscores the consistent message of this Court's COA cases – that proper administration of the federal habeas statute requires conscientious application of the requirement that courts of appeals issue COAs allowing merits consideration of all reasonably debatable habeas claims.[1]

Although the Ninth Circuit identified the correct COA standard in this case, Pet.App.12a, reciting the relevant passage from *Miller-El*, it utterly failed to apply that standard. Instead, it summarily rejected Morales's *Napue* claim, ruling, by necessary implication, that Morales's argument for relief under a should-have-known standard was not debatable despite a division of relevant circuit court authority. Review is warranted both to correct the error in Morales's case and to underscore the need for conscientious appeals court administration of the *Miller-El* standard.

The Ninth Circuit clearly erred in denying a COA on Morales's challenge to the prosecution's reliance on Samuelson's falsehoods. That Samuelson testified falsely is no longer in dispute. The State itself removed any conceivable doubt on this score when, pressured by Morales's habeas petition (and by revelations of misconduct involving government sponsored witnesses in other death-penalty trials prosecuted by the same county at around the time of Morales's trial),[2] it dispatched a Deputy AG to interview Samuelson. During that interview, arranged by the State to shore up Samuelson's facially implausible account of the circumstances

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1. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003); *see Tennard v. Dretke*, 542 U.S. 274 (2004); *Banks v. Dretke*, 540 U.S. 668 (2004); *Slack v. McDaniel*, 529 U.S. 473 (2000).

2. *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (en banc) (granting new trial based on San Joaquin County prosecutor elicitation of false testimony during 1981 capital trial); *see Belmontes v. Brown*, 414 F.3d 1094, 1115 (9th Cir. 2005) (San Joaquin County prosecutor violated obligation to "correct the false testimony and elicit the truth" regarding government favors to informant in capital trial arising out of 1981 homicide).

of Morales's supposed confession, Samuelson explained he had induced Morales to speak freely, in conversations held across a hallway in a crowded cellblock widely known to hold informants, by conversing with Morales in Spanish. Morales's inability to converse in Spanish, although unknown to Samuelson and state officials at the time of the Samuelson interview, is now well established – and uncontested. As a result, the AG no longer argues that Samuelson's testimony could have been true.

The AG nevertheless offers several defenses of the Ninth Circuit's unexplained decision to refuse jurisdiction over Morales's *Napue* challenge to the prosecution's use of Samuelson's falsehoods. None withstands inspection. First, the AG asserts that a COA was correctly denied because "no reasonable jurist" could have found Samuelson's lies were sufficiently material to implicate due process concerns in light of other record support for the critical lying-in-wait finding. Opp. at 13. But Samuelson's testimony is the *only* evidence relied upon as support for the lying-in-wait finding by the district court, Pet.App. 77a-78a, and the Ninth Circuit, Pet.App. 24a-25a.[3] When Samuelson offered this evidence, just weeks before the start of Morales's long-delayed trial, the prosecution bargained for it to support the lying-in-wait charge upon which a death sentence might ultimately depend. Pet. at 6 & n.1.

Samuelson's lies were not only indispensable to the lying-in-wait finding upon which Morales's eligibility for death now rests, they also provided critical support for the prosecution's arguments that the balance of aggravating and mitigating circumstances favored death. During the penalty phase, the defense presented testimony that Morales immediately felt deep remorse for his actions – testimony bolstered by Morales's statements to his trial psychologist that his actions had been "wicked." RT 2781, 3034. But this testimony was completely undermined by Samuelson's lurid, fabricated testimony that Morales, on the eve of trial, called Winchell "a fucking bitch" and boasted of having raped her to avoid wasting "a good

3. It is also, as Morales's petition shows, the only evidence plausibly cited by the California Supreme Court on this point. Pet. at 7.

piece of . . . ass," RT 2338-39, and that Morales solicited Samuelson to murder witnesses Pat Flores and Raquel Cardenas, RT 2341. Before retiring to decide whether Morales should be executed or imprisoned for life, the jury was repeatedly instructed that it should reconsider Samuelson's sensational lies in deciding the appropriate sentence. RT 3142-43, 3145. Indeed, it was told that Samuelson's testimony alone could be used to outweigh all mitigating evidence and justify the imposition of a death sentence. RT 3145. On this record, the materiality of Samuelson's false testimony is clear. There is, beyond question, a "reasonable likelihood" that Samuelson's false testimony could "'have affected the judgment of the jury[.]'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 271). Morales thus came forward with an ample showing of materiality to support issuance of a COA under *Miller-El's* "reasonably debatable" standard.

The AG alternatively argues that even if Samuelson's false testimony was material (as it clearly was), the Ninth Circuit's denial of a COA was still correct because the prosecution's conduct was not sufficiently blameworthy to suggest a due process violation. Respondent points out that the prosecution gave Samuelson a pre-trial polygraph test, obtained an examiner's report indicating that his answers were truthful, and disclosed the report to Morales's counsel. Opp. at 5.[4] But the polygraph test showed that Samuelson's answers were extremely deceptive. Counsel for Morales on federal habeas uncovered this fact and raised a *Napue* claim, arguing that the polygraph results, particularly when placed alongside Samuelson's facially implausible account of Morales's

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4. The AG also suggests, Opp. at 5, that prejudice attributable to Samuelson's lies was mitigated by the defense's opportunity to attack Samuelson's credibility using the proposed plea agreement. In fact, neither the "on the record" plea-bargain agreement nor the State's offer to dismiss Samuelson's outstanding felony charges was disclosed to the defense or the jury. Nor, for that matter, were defense counsel and the jury informed of the prosecutor's agreement to reinstate Samuelson's probation on prior offenses to spare him incarceration in state prison. *See* ER 77, Ex. J ("OSC viol[ation] was negotiated at change of plea").

purported confession, put the prosecution on notice of the falsity of Samuelson's story. ER C, Claim 17.

The AG's assertion that Morales pleaded his *Napue* claim narrowly, relying solely on actual knowledge of falsity, Opp. at 12-13, is baseless. Morales has consistently argued, from the start of the habeas process, that imputed knowledge of falsity – based, for example, on the prosecution's possession of information demonstrating the untrustworthiness of its evidence – can sustain a *Napue* claim. The two habeas petitions that Morales filed in 1992, one in federal district court and one in the California Supreme Court, sought relief under *Napue* because the prosecution "*knew or should have known* that Samuelson's receipt of an alleged confession from petitioner was false."[5] On appeal to the Ninth Circuit, Morales again expressly invoked the full breadth of the protection that *Napue* affords, seeking relief because the prosecution "'knew or should have known that the testimony [presented] was false,'" AOB at 57 (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)),[6] and arguing that "[b]ased upon the polygraph examination alone," the prosecution "knew, or should have known, that Samuelson was lying." AOB at 66. Presented with these statements, the AG has never before suggested that Morales sought relief under *Napue* based solely on an actual knowledge theory.

Viewed against this backdrop, the AG's additional waiver argument – *i.e.*, that Morales waived any objection to the Ninth Circuit's unexplained COA denial by failing to brief the division of appellate authority on constructive knowledge of falsehood, Opp. at 10-11 – is particularly odd. In presenting his *Napue* challenge to the Samuelson evidence on appeal, Morales reasonably relied on Ninth Circuit precedent that due process prohibits the use of testimony that the prosecution should have known was false. Although the Ninth Circuit did not explain its decision to deny a COA on the Samuelson

5. Pet. for Writ of Habeas Corpus, *Morales v. Vasquez*, No. 91-0682 (D.C. Cal. July 20, 1992) (Claim 17); ER C, Pet. for Writ of Habeas Corpus, *In re Morales*, No. S030276 (Cal. Dec. 16, 1992) (Claim 17).

6. *See also* AOB at 57 (citing *United States v. Young*, 17 F.3d 1201, 1203-04 (9th Cir. 1994), for the proposition that *Napue* reaches some "unwitting use[s] of false evidence").

Napue claim, it apparently took the view that *Napue* requires actual knowledge, since that is how the panel explained its rejection of a parallel *Napue* claim involving another witness. *See* Pet.App.39a-42a. The existence of a circuit split on *Napue*'s reach decisively demonstrates that the issue is open to debate by reasonable jurists, and that a COA should have issued. But Morales had no reason to brief the issue prior to the Ninth Circuit's presumed, and unexplained, departure from circuit precedent in denial of a COA on Morales's *Napue* claim respecting Samuelson.

Finally, the AG claims that a ruling on this COA question would "have no application to the overwhelming number of new habeas cases." Opp. at 8-9. Not so. Because the "substantial showing" standard now codified in 28 U.S.C. § 2253 is derived from the rule established in *Barefoot v. Estelle*, 463 U.S. 880 (1983), the COA requirement applies equally to pre- and post-AEDPA cases. *Slack*, 529 U.S. at 483.

II. Review Is Warranted To Address Morales's Facial Challenge To California's Lying-In-Wait Special Circumstance, Which Undisputedly Fails To Reduce The Class Of Eligible Defendants To "A Narrow Subclass."

The AG fails to respond to the substance of Morales's Eighth Amendment challenge, relying instead on misleading procedural arguments, namely, that: "(1) [Morales] asks only that this Court review the Ninth Circuit's application of settled Eighth Amendment precepts to the particular facts of this case; and (2) the Ninth Circuit properly denied [Morales] a COA consistent with this Court's opinion in *Arave v. Creech*, 507 U.S. 463 (1993)." Opp. at 17. The AG is wrong. First, as the Ninth Circuit recognized, Morales's challenge to California's lying-in-wait special circumstance is facial, not as-applied, so its significance extends well beyond the weighty stakes of his own case. Pet.App.27a. Next, the Ninth Circuit did not deny Morales a COA on this issue. The constitutionality of the lying-in-wait special circumstance was one of the five issues on which the court granted a COA. Pet.App.13a. Finally – and most critically – the AG misreads *Creech* to hold that a death penalty special circumstance passes muster under the Eighth

Amendment so long as it does not literally apply to every single person found guilty of murder. Opp. at 19-22. That is not the law. As Justices Ginsburg and Stevens observed, concurring in *Tuilaepa v. California*, 512 U.S. 967, 982 (1994), "the risk of cruel and unusual punishment . . . is diminished" only when "*a narrow subclass* of murderers can be subjected to the death penalty." (Emphasis added.)

In *Creech*, this Court granted review to determine whether the Idaho Supreme Court's limiting construction of a death penalty factor was unconstitutionally vague. 507 U.S. at 470-71. This Court determined that the language of the limiting construction - defining "utter disregard" for human life in terms of "cold-blooded, pitiless" intent - was sufficiently objective to pass muster. *Id.* at 470-74. This Court then briefly addressed whether the construction satisfied the narrowing requirement. *Id.* at 475-76. It found this question to be a "close" one, but concluded that the requirement was met because the subset of killers who "kill without feeling" excludes the large number who "kill with anger, jealousy, revenge, or a variety of other emotions." *Id.* Idaho's "utter disregard" factor could thus be said "'genuinely [to] narrow the class of persons eligible for the death penalty.'" *Id.* at 474 (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

Here, instead of providing a limiting construction that *narrows* the class of persons eligible for the death penalty, the California Supreme Court has offered the *broadest possible construction* of lying in wait. If *Creech* presented a "close" case, this one crosses the line, because California's lying-in-wait special circumstance applies to virtually every first degree murder, as the dissent in this case and numerous California Justices have pointed out. Pet. at 19-21.[7]

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7. Pet.App. 156a (Mosk, J., concurring in part and dissenting in part) (as interpreted by the California Supreme Court, lying-in-wait special circumstance "embrace[s] virtually all intentional killings."); *People v. Webster*, 814 P.2d 1273, 1306 (Cal. 1991) (Broussard, J., concurring in part and dissenting in part) (murder by lying in wait, as interpreted, does not justify imposition of the death penalty); *People v. Ceja*, 847 P.2d 55, 63-64 (Cal. 1993) (Kennard, J., concurring) (expressing "growing concern" that decisions "have undermined the critical narrowing function of the lying-in-wait special circumstance[.]").

Indeed, the AG acknowledges the stunning breadth of California's lying-in-wait special circumstance by suggesting that exclusion of even a single person found guilty of first degree murder suffices to narrow the class for Eighth Amendment purposes. Opp. at 20-21. Neither *Creech* nor any other opinion of this Court so holds.

In sum, the brief in opposition fails to rebut Morales's Eighth Amendment challenge to California's lying-in-wait special circumstance. This Court should grant certiorari to review this special circumstance, which has been repeatedly questioned by the California Supreme Court's own Justices and is at odds with the practices of other states.

III. Review Is Warranted To Resolve The Undisputed Circuit Split Concerning The Harmless Error Standard To Be Applied When State Courts Fail To Conduct Adequate *Clemons* Or *Chapman* Review.

The AG concedes there is a circuit split as to whether federal courts should apply the *Brecht* harmless error standard of review in a death penalty case, as opposed to the more stringent *Clemons* or *Chapman* standards, when they determine that a state court failed to conduct constitutionally adequate harmless error review in the first instance. The AG contends, however, that this split does not warrant review because only one of nine circuit courts to rule on the issue applies the *Chapman* standard, and because, it claims, the enactment of the AEDPA renders the question "academic." Opp. at 23. Neither argument is persuasive.[8]

First, it is basic that "[o]ne of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on [matters of federal law] among the federal courts of appeal." Robert L. Stern *et al.*, SUPREME COURT PRACTICE § 4.4 at 226 (8th ed. 2002); *see Thompson v. Keohane*, 516 U.S. 99, 106 (1995); Supreme Court Rule 10(a). This purpose is particularly salient

8. The AG also argues that the issue is "waived," relying mainly on cases finding waiver of issues not raised below *or in the petition for certiorari*. Opp. at 25, citing *Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001); *Pasquantino v. United States*, 125 S. Ct. 1766, 1781 n.4 (2005). The AG cites no case holding a circuit split must be raised prior to the petition for certiorari, because it would be futile to raise the issue in a circuit that has already decided the matter in question.